orig.

STATE OF MICHIGAN
IN THE SUPREME COURT

JUSTINE MALDONADO,

Plaintiff-Appellee,

-vs-

FORD MOTOR COMPANY,

Defendant-Appellant.

Supreme Court Case No. 126274

Court of Appeals Case No. 243763

Wayne County Circuit Court
Case No. 00-018619-NO

SCHEFF & WASHINGTON, P.C.
George B. Washington (P26201)
Counsel for Plaintiff-Appellee
65 Cadillac Square
Suite 3800
Detroit, MI 48226
(313) 963-1921

FORD MOTOR COMPANY
Robert W. Powell (P34127)
Co-Counsel for Defendant-Appellant
Three Parklane Boulevard
1500 Parklane Towers West
Dearborn Michigan 48126
(313) 845-0105

KIENBAUM OPPERWALL HARDY & PELTON, P.L.C.
Elizabeth Hardy (P37426)
Julia Turner Baumhart (P49173)
Counsel for Defendant-Appellant
325 South Old Woodward Avenue
Birmingham, Michigan 48009
(248) 645-0000

Patricia J. Boyle (P11084)
Of Counsel to Kienbaum Opperwall Hardy & Pelton, P.L.C.
325 South Old Woodward Avenue
Birmingham, Michigan 48009
(248) 645-0000

126274
reply

REPLY BRIEF IN SUPPORT OF DEFENDANT-APPELLANT FORD MOTOR COMPANY'S APPLICATION FOR LEAVE TO APPEAL

FILED
JUL 21 2004
CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Other Authorities

I. INTRODUCTION

In an effort to dissuade this Court from reviewing the flawed rulings of the Court of Appeals, Plaintiff and her counsel are engaging in extraordinary "shifting." They have shifted away from their earlier and repeated admissions that they not only disseminated inadmissible evidence for publication in the media, but that they did so proudly. Now, they contend that there was and is no evidence they ever participated in such misconduct. Similarly, they shift away from their previously uncontroverted public leadership roles in BAMN (and its many reincarnations, including the "Justice for Justine Committee") to now deny any affiliation whatsoever. The record is what it is on these and many other key points, and Ford is confident this Court will not rely on the unfounded and incorrect contentions of Plaintiff's counsel. The integrity of the judicial process, and the trial court's inherent authority to preserve and protect it, are too pivotal to the administration of justice to fall prey -- yet again -- to the gamesmanship and dissembling tactics of Plaintiff and her counsel that have been rampant throughout this proceeding.

II. ANALYSIS

A. Plaintiff's And Her Counsel's Attempt To Deny Their Misconduct Is Belied By The Record Evidence.

Plaintiff and her counsel take a "hear no evil, see no evil, do no evil" approach before this Court, as if sticking one's head in the sand can overcome the wealth of misconduct evidence reviewed by the trial court during the July 8-9, 2002 evidentiary hearing. See e.g., Appendix, Tab M, pp. 101-124; Tab N, pp. 234.[1] Suddenly, according to Plaintiff and her counsel, there is "no competent evidence" as to what they

[1] Video evidence reviewed by the trial court is attached as Appendix Tab T.

said in response to Judge Giovan's first admonition on May 17, 2002, even though Judge Giovan explicitly set forth in the record (and in his August 21, 2002 opinion dismissing Plaintiff's lawsuit) the content of what both the court and counsel said, without contradiction by Plaintiff's counsel -- until now (Appendix, Tab B, p. 9; Tab M, pp. 94-95). As Judge Giovan correctly noted, both Plaintiff and her counsel said they had no respect for or obligation to adhere to the law of this State.

Plaintiff's counsel go on to argue that they did not engage in misconduct because there is no claim they "made a statement" in the [June 12-19, 2002 Metro Times] article that violated Rule 3.6" (Plaintiff's Response, p. 22, emphasis added), despite their earlier admissions that they in fact gave the Metro Times reporter Mr. Bennett's conviction papers (see e.g., Exhibit U, Plaintiff's Brief on Appeal, pp. 24-25). These are semantic games by Plaintiff's counsel, intended to create a false impression.[2]

Perhaps most incredibly, Plaintiff and her counsel now take the position that there was no evidence of their participation in the June 26, 2002 dissemination to the media and the public of information about the inadmissible conviction. Yet, when Plaintiff's counsel Jodi Masley was questioned by Judge Giovan during the July 8-9, 2002 evidentiary about her involvement in the distribution of the leaflet referencing the conviction, she conceded that neither she nor Plaintiff could exclude the possibility that they had participated in the distribution of the leaflet at the World Headquarters demonstration on June 26, 2002. (Appendix, Tab M, pp. 111-112).[3] At other times

[2] Plaintiff asserts (Response p. 3) that the Attorney Grievance Commission "render[ed] a finding on these issues " -- an obvious misstatement since a decision not to prosecute is not a finding, nor did it address the multifaceted misconduct of Plaintiff and her counsel.

[3] Ms. Masley did expressly deny that she had distributed the leaflet at the June 27, 2002

during the hearing, Ms. Masley flatly denied saying what she unmistakably had said, even when the court challenged her veracity (compare, e.g., Appendix, Tab M, pp. 110-111 to Tab N, pp. 34-35). On this basis alone, Judge Giovan properly concluded that she had engaged in misconduct. The mendaciousness and other misconduct displayed by Ms. Masley and her colleagues during the July 8 session alone, substantiates their utter lack of respect for or intent to abide by the trial court's rulings.[4]

The present attempt of Plaintiff's counsel to deny their official status with BAMN (and that of the authors of the leaflet handed out on June 26, 2002) demonstrates the virtually boundless nature of their dissembling. This Court need only review BAMN's official agenda for the "public meeting" sponsored by that organization on June 1, 2002 (Plaintiff's Response Brief, p. 14), to see that Ms. Masley was, at the time, a "BAMN and MFJ Organizer" (Appendix, Tab G). Tanya Troy, the contact person on the "Justice for Justine" leaflet in question (Appendix, Tab J) was also a "National Organizer for BAMN" (Appendix G). And Plaintiff, along with her counsel Miranda Massie, were speakers at the BAMN "public meeting" on June 1, on how to achieve public exposure and collective

---

"Wixom Assembly" demonstration, which she claims neither she nor Plaintiff attended, but that was a separate event from the June 26th demonstration at Ford's World Headquarters. (Appendix, Tab M, pp. 102, 111-112). Further, when asked by Judge Giovan whether she or Plaintiff discouraged any of their fellow protesters from passing out leaflets referencing excluded evidence at a demonstration being filmed by the press, Ms. Masley shot back: "It is not my job to silence anyone's free speech. That's not my job." Id. at 103.

[4] See, e.g., Appendix M, pp. 16-18 (Ms. Massie telling Judge Giovan she is not nearly as untruthful as the court is); id. (in refusing to produce documentation requested by Judge Giovan, Ms. Massie explained "I'm not handing over my friends and acquaintances to you"); id at 46-54 (Mr. Washington attempting to exclude evidence of Plaintiff's report of attempted rape in Atlanta, a report he wanted in evidence until the police detective testified he believed Plaintiff fabricated the allegations); id at 60-64 (Mr. Washington arguing with the court over the impact of Plaintiff failing to follow another of the court's express directives).

action in sexual harassment claims, with "recent news footage" to demonstrate (Id). Other BAMN literature and newspaper articles confirm Ms. Massie's and Mr. Washington's longstanding official status with BAMN and its other incarnations (Exhibits V, W, X and Y).[5]

Plaintiff and her counsel claim as a fallback that, even if they did "assist[] others in making [the] statements" in the leaflets, [MRPC] 3.6 does not prohibit that" (Plaintiff's Response, p. 21). Plaintiff is incorrect, for, as Judge Giovan held in dismissing Plaintiff's case, Ms. Masley "does not have the right to ' . . . (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another'" (Appendix, Tab B, p. 8, quoting MRPC 8.4(a)). The circle is complete. Plaintiff and her counsel clearly denounced, derided, and disobeyed the law of this State, the rulings of the trial court, and all manner of ethical constraint. Their misconduct and their present attempts to dissociate themselves from it demonstrate with clarity how truly warranted dismissal was in this extraordinary situation.

Plaintiff does not even attempt to distinguish or rebut (nor can she) cases such as United States v Brown, 218 F3d 415, 428 (CA 5, 2000), that hold that a party's speech cannot be disassociated from her lawyers for purposes of Rule 3.6. The cases cited by Plaintiff are not to the contrary. Plaintiff made clear in her deposition and her June 26, 2002 television appearance that she knew she had been warned not to

[5] All three of Plaintiff's counsel also officiate over other organizations that are virtually interchangeable with BAMN. The interdependency between Plaintiff's counsel and the admitted leaders of the Justice for Justine Committee, e.g., Tanya Troy and Shanta Driver, is set forth at such well documented websites as http://www.goodspeedupdate.com and http://www.umich.edu/~mrev/archives/2000/04-12-00/vast.html.

publicize the inadmissible and expunged evidence, that she knew Judge Giovan would dismiss her case for publicizing this excluded evidence, that she was not going to obey Judge Giovan or the expungement statute, and that she did not care. Perhaps surprisingly, neither she nor her counsel even attempt to recharacterize or feign confusion over this crucial point.

B. Plaintiff And Her Counsel Had Ample Due Process Prior To Dismissal Under The Inherent Authority Doctrine.

Implicitly recognizing the Court of Appeals' flawed articulation and legal analysis of the inherent authority doctrine, Plaintiff ignores the actual holdings of that Court in favor of a footnoted observation concerning vagueness and due process. This is a detour from the real issue. As shown in Ford's application, Plaintiff and her counsel had ample due process as contemplated by the inherent authority doctrine. They knew exactly what Judge Giovan was telling them not to do, and they set about to do it anyway, with pride, knowing it violated his admonition.[6]

As Judge Giovan observed, Ford's motion to dismiss, as well as the July 8-9 evidentiary hearing concerning the motion, were "directed more at the alleged misbehavior of plaintiff herself and her counsel in publicizing material, either forbidden by statute-forbidden to be disseminated by statute or excluded from evidence by Judge MacDonald's order." Plaintiff disingenuously tries to portray this as a general gag order. That is not true. (Appendix, Tab N, p. 33). No one -- not Judge MacDonald, Judge

[6] The Court of Appeals and Plaintiff's Response make much of the lack of a formal "order" containing the trial court's admonition and directive. But Plaintiff and her counsel knew what was forbidden, and the inherent authority doctrine requires no formal order or other technical paper that might be necessary in another setting. The trial court is also entitled to presume that counsel understands what conduct is prohibited by the Rules of Professional Conduct and will act accordingly -- irrespective of whether a court order has been issued detailing what is appropriate, and what is not.

Giovan, or counsel for Ford or Mr. Bennett -- ever made an issue about Plaintiff or her counsel talking about what allegedly happened to her. Every single admonition, every single criticism, involved the subject matter of the motion to dismiss, i.e., publication of material "forbidden to be disseminated by statute or excluded from evidence by Judge MacDonald's order."

Plaintiff and her counsel do not say now, and they did not say then, that they were in any way confused by the trial court's directive. This is a conspicuous and significant point -- because they were in fact not confused. Any suggestion to the contrary now is a transparent effort to divert this Court from the real issue in this case, to wit: intentional and flagrant misconduct punishable under the inherent authority doctrine regardless of whether a particular form of order had been entered.

C. Case Precedents Cited By Plaintiff Demonstrate The Impossibility Of The Court Of Appeals' Standard.

Plaintiff's final argument with respect to the inherent authority doctrine is that leave should be denied until the trial court determines on remand that there has been "actual taint." As even Plaintiff's own authorities show, however, one can never prove actual taint. See e.g., Chemerinsky, Silence Is Not Golden: Protecting Lawyer Speech Under The First Amendment, 47 Emory LJ 859, 881-882 (1998) (attempts to prove prejudice will always be "inconclusive" because "it is impossible to try the same case to two juries, one which has been exposed to publicity and one that has been totally shielded"). Taking Plaintiff's arguments to their logical conclusion, Plaintiff and her counsel would be able to keep publicizing evidence the court has ruled inadmissible, with impunity, because Ford could never prove the jury was actually tainted. Plaintiff also foreshadows the outcome of any future attempts by the trial court to restrain her

speech (or that of her counsel) by claiming any such restraint would be invalid. Plaintiff's circular reasoning must be rejected out of hand. It is totally at odds with the principles on which the inherent authority doctrine is based.

D. Plaintiff's Argument Concerning "Propensity" Evidence Is Built On A False Foundation.

The second issue raised in Ford's application addressed the Court of Appeals' erroneous ruling that unreported, unwitnessed, and otherwise unknown allegations of supposed workplace sexual misconduct toward other female employees can serve as "notice" that Plaintiff's own work environment was sexually hostile. Ford's application pointed out that temporally and physically distinct occurrences involving others, not known to Plaintiff, and not timely or appropriately reported to Ford, were not relevant to Plaintiff's work environment and must therefore be excluded. Plaintiff's arguments in her Response revolve around a factually untrue theme -- i.e., that Ford did nothing to investigate or remediate the complaints of Plaintiff and other women regarding Mr. Bennett. This theme is premised on at least two blatant falsehoods: (1) that Plaintiff and her cohorts gave timely and adequate notice as required by Elliott-Larsen; and (2) that Plaintiff and her cohorts then cooperated in Ford's attempts to investigate.

Contrary to the assertions of counsel in Plaintiff's Response, the factual record demonstrates Plaintiff did not give the notice contemplated by Elliott-Larsen, nor did any of her colleagues. Plaintiff testified that she did not report harassment by Mr. Bennett when it allegedly occurred in approximately January or February 1998. Even as of October 1998, Plaintiff admitted she deliberately chose not to report it to Ford because she was not ready (Exhibit Z, Plaintiff's Deposition, p. 208). Instead, she had an impromptu conversation with an uncle (who was Mr. Bennett's peer at Ford) and with a

friend (who was acting as a clerical "temp" at Ford while negotiating a buy-out). In December 1999, when Plaintiff finally talked to a Labor Relations representative, the most "notice" she gave was an off-handed reference to Mr. Bennett, followed by her refusal to provide a statement. When she finally did complain, it was by filing this lawsuit in June, 2000, at which point Ford immediately removed Mr. Bennett from the workplace (he has never returned). Simply put, if there had been sexual misconduct by Mr. Bennett prior to the day Plaintiff finally complained (two years after it supposedly began), it stopped as soon as Ford received notice.

Every one of Plaintiff's propensity witnesses "complained" in the same manner, i.e., years after-the-fact and through litigation. Plaintiff's Response gives the false impression that Plaintiff and her colleagues gave timely and appropriate notice to Ford, and that Ford closed its corporate eyes. That is not what happened and is not what the record shows.

As for an investigation, Plaintiff proceeded like the other propensity witnesses she wants to call. She and they refused to talk with Ford other than through depositions in litigation, leaving Ford with no alternative other than to investigate under the constraints of the legal process. For Plaintiff to bemoan the fact that she and her cohorts tied Ford's hands in this regard is the height of hypocrisy. [7]

[7] It also must be remembered that the alleged claims of three of the five "propensity" witnesses, i.e., Milissa McClements, Pamela Perez and Jennifer Cochran, did not even surface until one year after Plaintiff filed this lawsuit, and Ms. Cochran admitted she did not have a sexual harassment complaint at all. Of the two remaining "propensity" witnesses, Shannon Vaubel's allegations first surfaced only four months prior to Plaintiff's lawsuit, and Lula Elezovic was adjudicated to have not given notice to Ford as a matter of law.

E. Plaintiff's Subjective Assessment Does Not Define Her "Work Environment."

Plaintiff further defends the Court of Appeals' ruling regarding the "propensity" witnesses by claiming that her subjective assessment of what is or is not her work environment is controlling. For example, Plaintiff argues that she perceived her work environment to be sexually hostile because she heard at some point about the alleged complaints of Ms. Perez and Ms. McClements while Plaintiff was still working at the Wixom Plant, even though they worked in other areas of the plant and even though Mr. Bennett was long gone. Plaintiff's claim is contrary to law. Indeed, this Court rejected this subjective standard in Radtke v Everett, 442 Mich 368; 501 NW2d 155 (1993), holding that "whether a hostile work environment exists should be determined by an objective reasonableness standard, not by the subjective perceptions of a plaintiff." 442 Mich at 388.

Even the primary case on which Plaintiff relies, Jackson v Quanex Corp, 191 F3d 647, 663-664 (CA 6, 1999), demonstrates that the inquiry is objective, not subjective. The other cases cited by Plaintiff analyzed only the evidence reported to the employer as of the time the plaintiff complained, or conduct actually witnessed by the plaintiff, not what the plaintiff learned after she complained and after the alleged perpetrator had been removed from the workplace. See Hurley v Atlantic City Police Dept, 174 F3d 95, 108-111 (CA 3, 1999), cert den, 528 US 1074; 120 S Ct 786, 145 LEd2d 663 (2000); Hall v Gus Const Co, 842 F2d 1010, 1012 (CA 8, 1988).

III. RELIEF REQUESTED

Nothing in Plaintiff's Response supports denial of Ford's application to this Court. If anything, Plaintiff's response serves to underscore the critical nature of the issues

Ford has raised, both for our State's jurisprudence and for the integrity of our Courts.

Ford respectfully requests that this Court grant its application.

Respectfully submitted,

KIENBAUM OPPERWALL HARDY & PELTON, P.L.C.

By: _____
Elizabeth Hardy (P37426)
Julia Turner Baumhart (P49173)
Attorneys for Defendant-Appellee
Ford Motor Company
325 South Old Woodward Avenue
Birmingham, Michigan 48009
(248) 645-0000

By: _____
Patricia J. Boyle (P11084)
Of Counsel to Kienbaum Opperwall
Hardy & Pelton, P.L.C.
325 S. Old Woodward Avenue
Birmingham, Michigan 48009
(248) 645-0000

Dated: July 21, 2004